

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLORIA RAMIREZ

Claimant

VS.

HALLMARK CARDS

Respondent

Self-insured

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Docket No. 255,952

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Brad E. Avery's May 24, 2002, Award. The Appeals Board heard oral argument on November 15, 2002.

APPEARANCES

The claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. The self-insured respondent appeared by its attorney Gregory D. Worth of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record as listed in the Award. Additionally, the record contains, by stipulation, respondent's medical-nursing records of claimant's various treatment visits and other health issues recorded by respondent's nurses during claimant's employment with respondent. The Board has adopted the stipulations listed in the Award. Additionally, the stipulations also should include respondent's payment of temporary total disability compensation to claimant for 19 weeks at \$366 per week or \$6,954 for the period from March 12, 2001 to July 22, 2001.

ISSUES

This is a claim for bilateral upper extremity injuries caused by claimant's repetitive work activities while employed by the respondent. The parties stipulated to a September 26, 2000, date of accident which was claimant's last day that she worked for the respondent. The Administrative Law Judge (ALJ) awarded claimant a 70 percent permanent partial general disability based on a work disability.

Respondent appeals and first contends that claimant only proved she suffered permanent injury to her right upper extremity and not her left upper extremity. Secondly, respondent contends, claimant proved she injured both upper extremities but in separate accidents and not simultaneous accidents. In the first contention, respondent argues claimant is only entitled to an award based on the loss of use of a scheduled right upper extremity injury. In the second contention, respondent argues claimant is only entitled to an award based on the loss of use of each separate scheduled upper extremity because the extremities were not injured simultaneously. Under either contention, respondent argues claimant has failed to prove a whole body injury which disqualifies her from an award based on a work disability.

Conversely, claimant requests the Board to affirm the ALJ's finding that claimant suffered a 70 percent permanent partial general disability resulting in the statutory maximum award of \$100,000.¹ Claimant argues she proved her repetitive bilateral hand intensive work activities caused simultaneous injury to her bilateral upper extremities resulting in a whole body injury and entitling her to a work disability. Moreover, claimant argues she proved she suffered a left upper extremity injury as the direct and natural result of overcompensating for a compensable right upper extremity injury also resulting in a whole body injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the ALJ's Award should be affirmed. The Board also agrees with the ALJ's findings and conclusions as set out in the Award. The Board finds it is not necessary to repeat those findings and conclusions in this Order. Thus, the Board adopts those findings and conclusions as its own as if specifically set forth in this Order. Except the Board does find one correction should be made to the Award. Dr. Gary L. Baker's whole body permanent functional impairment rating opinion was 7 percent instead of the 8 percent found in the Award.

The worker who simultaneously injures parallel extremities suffers a non-scheduled injury and is entitled to an award based on a whole body injury.² Parallel extremity injuries are also compensable as a whole body injury when one parallel extremity suffers injury as the direct and natural result of the other primary compensable parallel extremity injury.³

¹ K.S.A. 44-510f(a)(2).

² *Depew v. NCR Engineering & Manufacturing.*, 263 Kan. 15, 947 P.2d 1 (1997).

³ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Here, the Board finds claimant's testimony and the court appointed independent medical evaluator, Dr. Gary L. Baker's opinions support the conclusion that claimant simultaneously injured her upper extremities. Also, claimant's testimony and Dr. Baker's opinions support the conclusion that claimant suffered a compensable right upper extremity injury and then when she returned to work she overused her left hand compensating for her right upper extremity injury resulting in a permanent left upper extremity injury.

The following four physicians all testified in this case and all expressed opinions on claimant's permanent functional impairment, permanent restrictions and work task loss: (1) orthopedic surgeon Craig L. Vosburgh, M.D., was the physician chosen by the respondent to treat claimant, (2) Daniel D. Zimmerman, M.D., examined and evaluated claimant at claimant's attorney's request, (3) Gary L. Baker, M.D., conducted an independent medical evaluation of claimant at the request of the ALJ, and (4) Chris Fevury, M.D., examined claimant at the self-insured respondent's request.

The Board finds, since these medical opinions were quite varied, the most persuasive and impartial medical opinions were those expressed by the appointed independent medical examiner, Dr. Baker. Dr. Baker opined, as a result of claimant's work-related bilateral upper extremity injuries, she sustained a 7 percent whole body permanent functional impairment and she suffered a 78 percent work task loss. The ALJ also found Dr. Baker's opinions the most persuasive and adopted those opinions in his Award.

The Board also agrees with the ALJ's finding that claimant's wage loss was 62 percent based on the comparison of the stipulated pre-injury average weekly wage of \$735.25 compared to a post-injury imputed average weekly wage of \$280. The record proved that claimant had not made a good faith effort to find appropriate post-injury employment. Thus, the fact finder must determine an appropriate post-injury average weekly wage based on the evidence contained in the record.⁴ Here, vocational rehabilitation expert Michael Dreiling determined that claimant retained the ability to earn \$280 per week post-injury. The ALJ found claimant was entitled to a 70 percent permanent partial general disability by averaging claimant's task loss of 78 percent with claimant's wage loss of 62 percent which the Board also agrees is the appropriate award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's May 24, 2002, Award should be affirmed as follows:

⁴ *Copeland v. Johnson Group*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gloria Ramirez, and against the self-insured respondent, Hallmark Cards, for an accidental injury which occurred on September 26, 2000, and based upon an average weekly wage of \$735.25.

Claimant is entitled to 19 weeks of temporary total disability compensation at the rate of \$401 per week or \$7,619, followed by \$92,381 of permanent partial disability compensation payable at \$401 per week, until fully paid for a 70 percent permanent partial general disability, making a total award of \$100,000.

As of January 31, 2003, claimant is entitled to 19 weeks of temporary total disability compensation at the rate of \$401 per week or \$7,619, followed by 103.29 weeks of permanent partial disability compensation at the rate of \$401 per week or \$41,419.29 for a total due and owing of \$49,038.29, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, claimant is entitled to \$50,961.71 of permanent partial disability compensation at the rate of \$401 per week, until fully paid or until further order of the Director.

Claimant is further entitled to unauthorized medical up to the statutory maximum, upon presentation of an itemized statement verifying the same.

Future medical will be awarded upon proper application to and approval of the Director of Workers Compensation.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation